United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1602

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1602

B P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

JERRY ROSENBLUM,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

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TABLE OF CONTENTS

TABLE OF CASES

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Question Presented for Rehearing and Rehearing *En Banc*

Has this Court, by its ruling, completely undermined the doctrine of collateral estoppel?

Statement of the Case

Jerry Rosenblum (hereinafter "the petitioner") petitions this Court for rehearing (F.R.A.P., Rule 40) and suggests rehearing *en banc* (F.R.A.P., Rule 35), upon the ground that the Panel which considered this case either: (1) has, *sub silencio*, subverted prior holdings of the United States Supreme Court as set forth in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and *Harris* v. *Washington*, 404 U.S. 55 (1971) and the holding of this Court in *United States* v. *Kramer*, 289 F.2d 909 (2d Cir., 1951), or (2) materially misunderstood the factual and legal issues involved.

Prior Proceedings

Following a re-trial in the United States District Court for the Eastern District of New York, (Neaher, *J.*), petitioner was found guilty of conspiring to distribute and possess with intent to distribute cocaine in violation of section 846 of Title 21 United States Code.

This Court (Hon. Meskill, Markey and Motley), without opinion, affirmed the judgment of conviction on March 22, 1977.*

Reason For Granting the Petition

By its Ruling, This Panel Has Completely Undermined the Doctrine of Collateral Estoppel.

As has been shown more fully in the petitioner's brief heretofore filed with this Court, which we respectfully incorporate by reference into this proceeding, prior to the re-trial at which the conspiracy conviction appealed herein occurred, the petitioner had already been tried once for the charges contained in the eight-count indictment and had been acquitted by a jury of three substantive counts—4, 5, and 8.

By acquitting the petitioner of counts 4 and 5 at the first trial, the jury necessarily determined that the Government had failed to establish beyond a reasonable doubt that on April 4, 1975, within the Eastern District of New York, the petitioner "*did knowingly and intentionally possess with intent to distribute and did knowingly and intentionally distribute*" cocaine. Similarly, by acquitting the petitioner of count 8 at the first trial, the jury necessarily determined that the Government failed

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* See appendix "A" annexed hereto.

to establish beyond a reasonable doubt that on April 11, 1975, within the Eastern District of New York, the petitioner "*did knowingly and intentionally possess with intent to distribute*" cocaine.

Despite the necessary effect of the first jury's verdict that the petitioner *neither possessed nor distributed* cocaine on April 4, on the re-trial the Government was permitted, over the most strenuous objection by defense counsel, to establish that the petitioner was "the connection" for cocaine obtained by the Government's witnesses on April 4. Likewise, despite the first jury's verdict on count 8, the Government was permitted to establish that on April 11, the petitioner had been "fronted" cocaine and that he was "the man" for cocaine obtained by the Government's witnesses on April 11. Additionally, despite the first jury's verdict, the Government was permitted to introduce testimony by its surveillance agents and tangible exhibits concerning the events of April 4 and 11 which, it argued in summation, irrefutably established that the petitioner dealt in narcotics.

During oral argument before this Panel, in response to an inquiry propounded by Judge Motley, counsel for the Government candidly *conceded* that the Government considered its case on re-trial so dubious as to realize from the outset that in order for it to obtain a conviction on the conspiracy count, which charged a time period from April 1 through April 11, it was necessary to re-introduce evidence of the petitioner's alleged activities on April 4 and 11.*

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* This concession was not, of course, present in the Government's answering brief. In point of fact, the petitioner was convicted on the conspiracy count, but despite two trials, was never convicted of any substantive count and at sentencing all substantive counts upon which both juries had been hung were dismissed.

In light of the Government's concession at oral argument that it was necessary to relitigate the events of April 4 and 11 so as to obtain a conviction on the conspiracy count, the clear and inevitable effect of this Panel's affirmance of the judgment of conviction was, beyond peradventure, to subvert the holdings of the United States Supreme Court in *Ashe* and *Harris*, *supra*, and the holding of this Court in *Kramer*, *supra*. Indeed, given the Government's crucial concession, the rational and equitable underpinnings of the doctrine of collateral estoppel have been completely undermined and the doctrine itself, has been rendered nugatory by this Panel.

Simply put, the Government, *by its own concession*, perpetrated precisely that evil which the doctrine of collateral estoppel was designed to prevent against, and it is impossible, we submit, to square the ruling of this Panel (*sans* written opinion, no less!) with the noble aspirations of this Court expressed in *Kramer*:

> "More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614,—and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in Abbate v. United States, 1959, 359 U.S. 187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior

> judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, see United States v. Sabella, 2 Cir., 1959, 272 F.2d 206, 211, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not *prove* the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be" (emphasis supplied, 289 F.2d 919).

It must be recalled that even though the District Judge purported to draw "a sharp line that there would be no testimony placing the defendant in possession" of cocaine (R. 321, 326), the Government *was permitted* to establish that on April 4 and 11 the petitioner was "the connection" and "the man" for cocaine and that cocaine was "fronted" to him. These words, in the context of a narcotics trial, especially when taken together with the District Judge's charge on circumstantial evidence, meant nothing other than that *despite the verdict of the first jury*, the petitioner did knowingly and intentionally possess with intent to distribute and did knowingly and intentionally distribute cocaine on April 4 and 11. It is most unfortunate that this Panel has chosen, in cardinal defiance of established rules of construction and interpretation, to refuse to accord these ordinary words their usual and commonly understood meanings simply for the purpose of affirming a judgment of conviction.*

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* Indeed, the Government, in its brief and during oral argument, *did not even attempt to refute* petitioner's contention that within the context of the case at bar, "connection" could only mean possession and distribution of narcotics.

CONCLUSION

For the above reasons, rehearing or rehearing *en banc* ought be granted.

Respectfully submitted,
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APPENDIX

Order

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of March, one thousand nine hundred and seventy-seven.

Present: HON. THOMAS J. MESKILL
Circuit Judge

HON. HOWARD T. MARKEY
Chief Judge, U.S. Court of Customs and Patent Appeals

HON. CONSTANCE B. MOTLEY
District Judge

76-1602

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JERRY ROSENBLUM, HENRY MAYORGA,
Defendants,

JERRY ROSENBLUM,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Order

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it is hereby is affirmed.

A. DANIEL FUSARO
Clerk

by
ARTHUR HELLER
Deputy Clerk

Dolores M. Byrd
11-1-07

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